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FACTS

The issue presented on this appeal is whether an insurance agency may be held liable for breach of the good faith obligation contained in all Mississippi contracts when it prevents an agent from obtaining employment with another agency by arbitrarily insisting on payment of money which is not owed.

Plaintiff/Appellant Jimmy Daniels (hereinafter "Daniels") worked as an agent for Defendant/Appellee Parker and Associates, Inc. (hereinafter "Parker")[1]. In this capacity, Daniels sold insurance policies issued by several insurance companies and was paid when he submitted the applications. [R:184-186]. Parker and Associates maintained an account in which it kept a record of the amounts owed to Daniels or which Daniels owed to Parker. The records would reflect the commissions which Daniels was owed or a negative balance when Daniels would owe Parker. For example, indebtedness could arise from Daniels to Parker when a customer decided that he or she did not want the policy which Daniels had sold him or her, which would result in a "charge back" [R:187], or Daniels could be charged for "leads," which Parker had furnished him. [*Id.*] Daniels was also supposed to be "charged back" whenever a policy was canceled within ninety (90) days of the date it was sold [*Id.*], or when the company refused to accept an applicant because he or she did not meet policy requirements. [*Id.*]

Daniels decided to terminate his agency agreement with Parker in order to accept an employment offer he had obtained from Progressive Life Insurance Company. [R:217]. Accordingly, on October 1, 2008, Daniels, in conformity with insurance industry custom, asked for a "release" from his exclusive contract to sell insurance with Parker. [*Id.*] A release is a standard

[1] The other Defendants/Appellees are affiliate companies of Parker and Associates, Inc. [R:190].

industry document which acknowledges the consent of a former general agency (here, Parker) for a subordinate agent (here, Daniels) to sell insurance through competitor agencies or directly for an insurance company. [R:211].

The heart of Daniels' claim of a breach of the obligation of good faith is his contention that Parker would not grant such a release unless Daniels paid Parker money which it knew was not owed. According to Daniels, at the time he sought his release, his account with Parker should have reflected Parker owing him approximately $30,000.00 in unpaid commissions. [R:197]. According to Daniels, these amounts were due from Parker because of various overcharges, which Parker had made against his account. According to Daniels' testimony, these included failing to credit him for insurance renewals which policy holders had made [R:206], making improper charge backs for policies which, in fact, had been canceled after they had been in effect for more than ninety (90) days, making charge backs which were not due at all [R:205], and charging him for cancellations of policies which he had learned from the policy holders had not, in fact, been canceled. [R:200]. Rather than acknowledge an indebtedness by Parker to Daniels, Parker claimed that Daniels owed it over $20,000.00. According to Daniels, this was a dishonest claim made to keep Daniels from going to work for another agency. [R:210]. Daniels requested to know the basis of the claimed indebtedness through the following email:

> "Please provide the aforementioned company reports or whatever reliable documentation you may have to support the data in the spreadsheets so that we can accurately determine the status of these policies. All you have provided is data input by your company, which is not evidence of a substantial debt owed. It took less than three (3) hours to gather the information directly from each company, on which we base our belief that your report is erroneous. I understand that you are trying to make sure that your company is not left "holding the bag". However, Mr. Daniels does not feel that you are operating in good faith to resolve this situation."

[R:153].

Daniels testified that Parker's response to his attempts to obtain some documentation of a debt, or to dispute Daniels' claims that he was the one who was owed the debt, was Parker's position that it would ensure that Daniels either paid the alleged debt or did not work elsewhere in the insurance industry. According to Daniels, Parker's agent, Michael Edward Hosch, told him that if he did not work for Parker, "he would not work." [R:210]. Daniels' testimony is confirmed by an email in which Hosch stated:

> "Joyce, Mr. Daniela [sic] has verifiable debt of over $24,000 and has been trying to get released from us by hook or crook to dodge this debt. He hired a law firm to attempt to get a release, but after receiving this letter below they have dropped their efforts. He has called and terminated his Pyramid contract so that he can get under another FMO. Can you please either reactivate him with Parker & Associates or make him un-hirable in the UAFC system. We prefer that he be active with us so that any attempt to move to another FMO will have to go thru us."

[R:335].

In his deposition, Daniels swore that Parker would not grant him the release so that he could work for another company unless he either paid Parker $24,000.00 or signed a promissory note agreeing to do so. [R:220, 224]. Because Daniels would not either pay $24,000.00 he did not owe or sign a promissory note agreeing to do so, Daniels lost an opportunity to go to work under a lucrative contract with another insurance company. [R:228-229].

REPLY ARGUMENT

There Are Issues of Material Fact as to Whether Parker Arbitrarily Insisted on Payment of Money Not Owed in Order to Prevent Daniels from Working for Another Company, Thus, Breaching the Obligation of Good Faith.

Parker argues that it did not commit a bad faith breach of contract because Daniels understood how the "escrow" account worked and that, according to Parker's records and those of

its insurers, Daniels did, in fact, owe Parker for charge backs or payment of unearned commissions. [Brief of Defendants/Appellees, pp. 23-25]. However, whether Parker was making a legitimate claim of an indebtedness by Daniels to it represents a question of material fact. Daniels has sworn that Parker was being dishonest in claiming an indebtedness, and has claimed the indebtedness was based upon such matters as claiming that policies had been canceled when they were still in effect, overcharging Plaintiff for a computer [R:188], claiming customers had canceled policies when the policies were still in effect [R:200], and refusing to credit Daniels for renewals of policies which he knew had been made. [R:206]. According to *Robinson v. Cobb*, 763 So. 2d 883, 886 (Miss. 2000), "if one party swears to one version of events and another party swears to a different version, summary judgment should be denied."

Besides the fact that Daniels and Parker's witnesses have sworn to different versions as to who owed whom money, an issue of Parker's good faith is presented by the fact that Parker has now acknowledged that, over time, any indebtedness that Daniels had because of charge backs would eventually be diminished as policies were renewed and premiums came due to Daniels because of those renewals. According to the last sentence of footnote 19 in the Brief of Defendants/Appellees, p. 27:

> "Eventually, the renewal and override commission paid off the negative balance on Plaintiff's account created by the charge backs."

Thus, even improperly crediting Parker's testimony as being true, a jury issue would still be presented as to Parker's bad faith, because Parker knew that that indebtedness would eventually diminish or decline to a negative balance. Parker's insisting upon Daniels' executing a promissory note or paying Parker some $24,000.00 in advance, thus may be found by a jury to have been a bad faith insistence upon payment of a debt which Parker knew was not due. With Parker's

acknowledging that even if a debt existed it would eventually be paid or at least diminished by future renewals, Parker's insistence on payment of a cash amount or execution of a promissory note as a condition to Daniels' release may be found by a jury to be nothing more than Parker's attempting to force Daniels to continue to work for it on penalty of extorting from him a large amount of money, which was not owed.

Parker's brief never denies the general proposition that every contract contains an obligation of good faith. Rather, Parker insists that any good faith obligation ceased when Daniels ceased working for Parker as an agent and requested the release. [Brief of Defendants/Appellees, p. 18]. According to Parker, "There was no existing contract in October 2008, when Plaintiff requested the release." [Brief of Defendants/Appellees, p. 12]. However, this argument ignores Parker's own evidence that granting or refusing releases is a part of the ordinary course of business between general agents and their subagents. According to the Affidavit of Stephen J. Voss, furnished by Defendant in opposition to Motion for Summary Judgment, "To request and to grant or refuse to grant a 'release' of this nature is a common occurrence within the insurance industry whenever an independently contracted insurance agent desires to realign his agency status with a different upline commission hierarchy . . ." [R:161-162]. Of course, the custom or policy within an industry is relevant in determining the meaning of a contract. *See Home Owners Ins. Co. v. Keith's Breeder Farms, Inc.*, 227 So. 2d 293 (Miss. 1969) ("Insurance policy would be construed in light of nature and long continued customs of the business"). *See O. J. Stanton & Co., Inc. v. Mississippi State Highway Comm'n*, 370 So. 2d 909, 914 (Miss. 1979) (While custom and usage cannot prevail over express terms of contract, custom and usage can be utilized to explain meaning of contract and ambiguities in contract).

In this case, Parker never denied a general obligation to furnish a "release," so as to provide evidence that an agent was no longer working for a general agency, thus allowing the agent to work elsewhere. Parker's only claim was that no release was due because it was owed money by Daniels. Whether this obligation was made in good faith and with an honest belief that it was owed money, or whether it was done, as evidentiary material indicates, for the bad faith purpose of keeping Daniels from working elsewhere, is a material issue of fact. Questions of intent and state of mind are questions of fact. As former Justice Rehnquist of the United States Supreme Court has said:

> "The state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much as fact as anything else."

U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716-17 (1983).

Parker's argument that the good faith obligation does not apply through analogy to the employment-at-will doctrine, [Brief of Defendants/Appellees, pp. 15-16] is misplaced. The main case cited by Parker for this proposition, *Young v. N. Mississippi Med. Ctr.*, 783 So. 2d 661, 653 (Miss. 2001), holds only that the obligation of "good faith" cannot be utilized to escape the Mississippi rule that an employer can fire an employee for a bad reason or no reason at all. Here, Daniels' argument that Parker was acting in bad faith by seeking to keep Daniels from working elsewhere through an arbitrary insistence that he pay money he did not owe, is not inconsistent with any other Mississippi law such as the employment-at-will doctrine. Indeed, by utilizing a bad faith claim that it was owed money in order to keep Daniels from working elsewhere, Parker is infringing upon a well-settled principle of Mississippi law, which is that one has an obligation to refrain from maliciously interfering with prospective contracts of another. *See MBF Corp. v. Century Bus.*

Communications, Inc., 663 So. 2d 595 (Miss. 1995) (recognizing tort of interference with business relationships).

In this case, unlike *Young v. N. Mississippi Med. Ctr.*, recognizing that Parker could be held liable to a jury for its bad faith claim of an indebtedness when none existed is not inconsistent with any settled Mississippi law. To the contrary, it is consistent with Mississippi law, which obligates one to refrain from interfering with business relations of others.

Because there are issues of material fact as to whether Parker made a malicious, false claim of an indebtedness in order to deny Daniels' release so that he could go to work for a competitor agency, the motion for summary judgment should have been denied.

CONCLUSION

The Court should reverse the grant of summary judgment and remand for a jury's determination as to whether Parker falsely and maliciously claimed that a debt was due, not for any legitimate business purpose, but for the bad faith purpose of keeping Daniels from working for another.

RESPECTFULLY SUBMITTED, this the 16th day of April, 2012.

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CERTIFICATE OF SERVICE

This will certify that undersigned counsel for Appellant has this day served a true and correct copy of the above and foregoing **Reply Brief of Appellant,** via First-Class U.S. Mail, postage-prepaid, to the following:

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CERTIFICATE OF FILING

This will certify that undersigned counsel for Appellant, pursuant to Miss. R. App. P. 25(a) and 32(m), has this day filed the **Reply Brief of Appellant** by mailing the original and three (3) copies of said document, along with an electronically formatted copy thereof in Adobe Portable Document Format (PDF) on CD-ROM, via prepaid Federal Express next-day delivery, to the following:

Kathy Gillis, Clerk
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